

**STATEMENT OF THE METROPOLITAN WATER DISTRICT OF
SOUTHERN CALIFORNIA TO THE STATE WATER RESOURCES
CONTROL BOARD ON ISSUE NO. 3 -- JUNE 14, 1994**

The Metropolitan Water District of Southern California ("Metropolitan") submits these comments on its own behalf to supplement the comments submitted jointly by the urban agencies known as the "Bay/Delta Urban Coalition" ("urban coalition").

Metropolitan Joins the Urban Coalition Comments.

Metropolitan has been part of the informal Bay/Delta urban coalition since that group of agencies began submitting joint comments to the United States Environmental Protection Agency regarding its proposed Bay/Delta standards and to the State Water Resources Control Board (State Board) in these workshops. Metropolitan is also a member of the California Urban Water Agencies (CUWA) organization and continues to fully support and endorse all of the comments filed by both the urban coalition and CUWA to date, including those filed for this June 14 workshop.

The urban coalition comments include a consensus position on Issue 3 of the State Board's Notice for this workshop. In its first comments submitted at the State Board's April 26, 1994 workshop, the urban coalition stated:

"Simply stated, all parties using water from, or affecting the water quality of, the Bay/Delta Estuary and its watershed must be required to not only mitigate the direct impacts of their activities, but must equitably share in the responsibility of providing Delta outflow."¹

The urban coalition statement for this workshop reiterates the position that the State Board should "adopt an allocation method that reasonably and rationally allocates responsibilities with due regard to existing scientific analysis, public policy and legal principles."²

While the urban coalition and CUWA have been consistent on this fundamental principle, they have not attempted to describe the method for State Board implementation, nor to articulate the policy/legal basis for that position. Metropolitan desires to elaborate on the urban coalition comments on Issue 3 to set forth such a method and an accompanying legal and policy basis.

¹ Statement of the Bay/Delta Urban Coalition Regarding the State Water Resources Control Board's Adoption of Bay/Delta Standards-- April 26, 1994, p. 7.

² Statement of the Bay/Delta Urban Coalition to the State Water Resources Control board--Workshop #3, Issue #3, p. 2.

All Uses of Water in the Bay/Delta Watershed Affect the Ecosystem of the Bay/Delta Estuary.

Most of California's people, factories, farms and businesses are users of water from the Bay/Delta watershed. All of these uses have some impact on the Bay/Delta ecosystem and its aquatic resources. These impacts result from the diversion of flows from the Delta and from rivers and streams tributary to the Delta, direct entrainment of fish, polluted return flows and discharges, temperature impacts, loss of riparian habitat and wetlands, and alteration of the natural Delta environment. The magnitude of the impacts caused by specific water users obviously will vary, but each has at least an incremental impact on the environment.

In past State Board regulatory proceedings, only certain areas of the state -- those served by the State Water Project (SWP) and Central Valley Project (CVP) -- have been required to bear the burden of mitigating these impacts. Because of dramatic increases in the state's population and economy in recent decades, coupled with the increasing recognition of the need to protect and restore the Bay/Delta environment, it is neither equitable nor sound policy to require only certain water users to mitigate impacts to the Bay/Delta ecosystem that are caused by all water users. Furthermore, if the Bay/Delta is to be adequately protected, the urban areas of Southern California, the San Francisco Bay area and the central coast and the farm

communities reliant on the state and federal projects should not be expected to bear the entire burden of protecting and restoring Bay/Delta resources.

The State Board Has Broad Authority to Regulate All Water Uses to Protect the Environment.

California's Constitution and Water Code give the State Board "broad, open-ended, expansive authority to undertake comprehensive planning and allocation of water resources."³ A broad exercise of that authority is particularly appropriate in the Bay/Delta context because that system is at the center of so many interests--environmental, aesthetic, economic, public health--critical to the state and its people. In exercising its authority, the State Board is directed to enforce the "cardinal principle" of reasonable use on all water users in the Bay/Delta system in order to achieve that balance which best protects the "public interest."⁴

In exercising its authority, the State Board unquestionably can, and should, identify localized impacts caused by specific non-project water users and require those users to implement measures to mitigate those impacts. Apart from those localized impacts, however, the State Board must also identify

³ National Audubon Society v. Superior Court (1983) 33 Cal.3d 419, 444)

⁴ United States v. State Water Resources Control Board (1986) 182 Cal.App.3d 82

and allocate to non-project water users an equitable share of the responsibility for mitigating the more generalized cumulative impacts of diversion and use of water caused by all water users. For example, all depletions of water, whether taken upstream or directly from the Delta, reduce flows through the Bay/Delta system to some extent. It is entirely consistent with the State Board's authority to require that all those responsible for such depletions should share in remedying any Delta-related impacts caused by reduced outflow, including participating in achieving an estuarine habitat or outflow standard. However, allocating the responsibility for mitigating this type of shared impact is complicated by a number of factors.

For example, some water users in upstream areas claim that because of their historical temporal priority under the traditional water rights scheme, they should be entirely insulated from any obligation to mitigate for their share of cumulative impacts to the Bay/Delta system. Instead, they assert that the responsibility for dealing with outflow impacts should be imposed solely on the state and federal projects. There is no absolute legal nor physical impediment, however, to the State Board requiring these upstream users to also bear an equitable share of mitigating for reduced flows and degraded return flows along with the state and federal projects. The "Racanelli" decision leaves no doubt that the State Board "cannot ignore" actions which can be taken against non-project water users, such as "remedial actions to curtail excess diversions and pollution

by other water users."⁵ The Racanelli decision also leaves no doubt that in taking such actions, the State Board is not constrained by the fact that these other users have temporal priorities earlier than those of the projects:

"If the Board is authorized to weigh the values of competing beneficial uses, then logically it should also be authorized to alter the historic rule of 'first in use, first in right' by imposing permit conditions which give a higher priority to a more preferred beneficial use even though later in time.

" . . .

"The scope and priority of appropriative rights are properly defined by the Board acting within its powers to consider the relative benefits of competing interests and to impose such conditions as are necessary to protect the public interest." ⁶

We do not argue that the traditional priority scheme can or should be disregarded. Metropolitan does believe, however, that the administration of water rights--both senior and junior--must occur within the context of fundamental constitutional and statutory public policies which provide that all water users may be regulated to insure that "the water

⁵ United States v. State Water Resources Control Board, supra, 182 Cal.App.3d at p. 120.

⁶ United States v. State Water Resources Control Board, supra, 182 Cal.App.3d at pp. 132-133.

resources of the State be put to beneficial use to the fullest extent of which they are capable . . . in the interest of the people and for the public welfare."⁷ While a relatively early priority is a property right which must be respected, it is nonetheless subject to public interest regulation as are all property rights. The State Board has full authority, as well as the duty, to evaluate every water user's diversion and use of water to determine whether it would be reasonable to condition that use in order to make more water available for other competing beneficial uses, irrespective of whether such competing uses are earlier or later in time. This concept, while most recently and relevantly analyzed in the Racanelli case, has been part of California law since Article X, Section 2 was added to the Constitution, if not before.⁸

⁷ Cal. Const., Art. X, § 2; Cal. Water Code, § 100. See also Water Code § 106, "It is hereby declared to be the established policy of this State that the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation."

⁸ See Tulare Dist. v. Lindsay-Strathmore Dist. (1935) 3 Cal.2d 289, court refused to enjoin use of water under a junior priority in the absence of a determination whether the senior users were putting the water to reasonable use "considering all the needs of those in the particular water field"; Joslin V. Marin Mun. Water Dist. (1967) 67 Cal.2d 132, senior user's water use could be limited to benefit junior users based on "statewide considerations of transcendent importance"; People ex. rel. SWRCB v. Forni (1976) 54 Cal.App.3d 743, State Board could require senior user to "endure some inconvenience or to incur reasonable expenses" in order to benefit junior users.

Proposed Approach to Establishing Mitigation Responsibility for Impacts on the Bay/Delta System.

It is against this background that the urban coalition has proposed that the State Board "should adopt an allocation method that reasonably and rationally allocates responsibilities with due regard to existing scientific analysis and legal principles." The urban coalition has not yet developed a joint proposal on the mechanism that should be adopted to achieve this result, recognizing that it will be a complex and time consuming process. The group has, however, urged the State Board not to wait for a precise quantification of each user's impact before it issues a decision allocating responsibility for protection of the Bay/Delta system.

Based on early discussions with some urban coalition members, Metropolitan proposes a conceptual framework which the State Board could use to issue an interim decision assessing and allocating relative impacts caused by upstream water users, which would be in effect until a more precise quantification and allocation is available. We believe the adoption of such a framework is required in order to equitably allocate the responsibility for providing the necessary level of protection required by Bay/Delta aquatic resources.

The method proposed involves three steps. First, an estimate of each user's share of cumulative impacts of diversion

and use of water from the Bay/Delta system would be determined based on that user's proportionate share of the total net depletions or diversions from the unimpaired flow to and through the Delta.

Next, the base impact attributable to each user would be specifically reviewed to determine whether it is reasonable and in the public interest to assess the user with that level of responsibility. A range of factors--some positive and some negative--would be considered which could increase or decrease that user's responsibility. Ideally, some objective criteria could be developed to rate these factors. However, because of the wide range of water users and variables affecting the reasonableness of use, a good deal of policy judgment always would be a part of the equation. Without attempting to exhaustively identify the factors that could be considered in this step, they could include:

- the water user's priority;
- whether the user practices appropriate water management, practices such as conservation, reclamation, drought management planning, good groundwater management;
- the water user's per capita or acre-foot per acre use;
- other specific impacts associated with the user's diversion/use, such as entrainment, reverse flows, effect on timing and temperature, polluted return

flows;

- the population or economic activity supported by the use;
- creation of habitat outside the Bay/Delta system that enhances environmental uses;
- the extent to which the user is already mitigating its impacts, such as the SWP's fisheries mitigation programs and CVP's contribution of water under the Central Valley Project Improvement Act, and whether the user's diversion is screened.

The application of these "public interest factors" would more specifically relate a water user's responsibility to its particular situation and the appropriateness of its water use. Even after a water user's responsibility has been so determined, however, it may be that because of the particular circumstances facing the user, it would be unreasonable to require that user to directly meet its responsibility with water. Therefore, as a third step, a program would be developed to allow a user to establish "mitigation credits", as appropriate, to meet its obligations indirectly, in lieu of directly meeting the obligation determined by the State Board. As examples, a water user could be allowed to contribute money to fund the purchase of environmental water from willing sellers or to implement or fund physical habitat restoration measures. Such a mitigation credits program should be a part of a comprehensive protection program for the Bay/Delta ecosystem.

The initial allocation of responsibility which results from this three step process would serve as an interim decision until a more refined approach is developed. Metropolitan endorses the scientific research effort recently authorized by CUWA to develop data that could be used in establishing such a process. Once a more refined approach is developed, the State Board could then re-evaluate its decision with respect to specific water users or groups, either through a water rights review proceeding or, perhaps, through a conflict resolution process in which all parties could be invited to participate.